IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.344 OF 2006

WITH

CIVIL APPLICATION NO.429 OF 2006

Shri Antoneo B.D'Souza ...Appellant

Versus

Shri Arun Keshav Joshi ...Respondent

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Mr.R.S.Apte i/b Mr.M.S.Lagu for Appellant.

Mr.P.S.Dani for Respondent.

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CORAM: A.M.KHANWILKAR, J.

JULY 28, 2006.

P.C.

1. Preliminary objection is taken by Mr.Dani for the Respondent that this Appeal from Order is not maintainable, as the same is directed against the order passed by the lower Court (Additional District Judge, Raigad, Alibag) on Appeal under Order 43 of Code of Civil Procedure (hereinafter referred to as 'the Code'), though an order of remand. Mr.Apte for the Appellant, on the other

hand, contends that the Appeal from Order is available in view of clause (u) of Rule 1 of Order 43 read with Rule 2 of Order 43 of the Code.

2. I find substance in the stand taken by the Respondent that this Appeal from Order is not maintainable. Mr.Apte is not right in placing reliance on Rule 2 read with Rule 1(u) of Order 43 of the Code in support of this submission. Indeed, Rule 2 provides that Rules of Order 41 shall apply so far as may be possible, to Appeals from Orders. What is relevant for our purpose is to note the mandate of clause (u) of Rule 1 of Order 43 of the Code. That is a provision providing for remedy of Appeal from Order against the order under Rule 23 or Rule 23A of Order 41 remanding the case where the Appeal would lie from the decree of the Appellate Court. This clause has no application to the fact situation of the present case which relates to an order passed on an appeal under Order 43 of the code. It is only when the Appeal was covered by any one clause of Rule 1 of Order 43 of the Code, that the operation of Rule 2 would come into play with regard to the procedure to be

followed in such Appeal.

3. Thus understood, the preliminary objection taken by Mr.Dani will have to be upheld. The Appeal will have to be therefore dismissed as not maintainable.

4. At this stage, Mr.Apte for the Appellant seeks liberty to convert this Appeal into Writ Petition under Article 227 of the Constitution of India. Ordinarily, in the interest of justice, that indulgence could have been shown but the format of the Writ Petition is substantially different than the memo of Appeal from Order.

5. In the circumstances, this Appeal is dismissed as withdrawn with liberty to the Appellant to take recourse to such other remedy as may be permissible in law.

6. In view of this order, the accompanying Civil Application is also dismissed.

A.M.KHANWILKAR, J.